January 2003

Foreword: Law, Labor and Gender

Jennifer B. Wriggins
University of Maine School of Law

Follow this and additional works at: https://digitalcommons.mainelaw.maine.edu/mlr

Part of the Labor and Employment Law Commons, Law and Gender Commons, and the Law and Society Commons

Recommended Citation
Available at: https://digitalcommons.mainelaw.maine.edu/mlr/vol55/iss1/2

This Foreword is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.
FORWARD: LAW, LABOR, & GENDER

Jennifer Wriggins*

I. INTRODUCTION

This symposium issue of the Maine Law Review includes articles written for a national conference held on September 14, 2002 in Portland, Maine entitled “Law, Labor, & Gender.” This event is part of a tradition of symposia and conferences on law and gender at the University of Maine School of Law. The first conference, “Justice and Gender,” was held in October 1991, and was a lively and stimulating event.¹ In 1998, a very successful conference on Law, Feminism, and the Twenty-First Century was held, which led to a varied and fascinating Maine Law Review symposium issue.² And in September 2002, over 180 law students, lawyers, judges, and community members participated in a stimulating day-long conference. One hallmark of all of the University of Maine School of Law conferences is the active participation of law students, lawyers, and judges, as well as law professors, in planning and executing the events. To give credit where it is due, students have initiated the conferences. The wonderful collaboration that has taken place in putting together the conferences and symposia is fitting for conferences with a feminist theme, since it furthers feminist objectives of challenging traditional hierarchies.³

The theme of the conference, Law, Labor, & Gender, came out of a working group comprised of law students, lawyers, a judge, and myself. We thought that a number of issues deserved attention, ranging from current jurisprudence on employment discrimination to more theoretical issues having to do with work/family dilemmas. Professor Deborah Rhode kindly accepted our invitation to be the keynote speaker, and various other academic speakers also agreed to present papers. The working group, and the editors of the Maine Law Review, drafted and sent out a call for papers to approximately 1600 law professors and others. The Law Review editors were gratified to receive more excellent proposals than the symposium had room for, and engaged in a difficult selection process. The response to the call for papers led us to issues that we did not even know about,⁴ and resulted

* Professor of Law, University of Maine School of Law. Many thanks to the Editors of the Maine Law Review, for their dedicated and skilled work on this Symposium issue. I want to particularly thank Shawn Worden for his outstanding work in developing and following up on the call for papers, Jennifer Williams for her superb work as Editor-in-Chief, and Sarah Marble for her excellent work as conference organizer. Many thanks also to Dean Colleen A. Khoury for her invaluable support of the conference and to Lois Lupica, Deborah Tuerkheimer, and Sarah Marble for reviewing drafts of this introduction.

1. It led to the publication of Kathleen E. Mahoney’s important article, The Constitutional Law of Equality in Canada, 44 Me. L. Rev. 229 (1992).
3. As Martha Minow wrote in an earlier symposium issue, “[f]or feminist critics, legal pedagogy should promote listening as well as talking and collaboration as well as individual excellence.” Martha Minow, Keeping Students Awake: Feminist Theory and Legal Education, 50 Me. L. Rev. 337, 338 (1998).
4. For example, the exception to Title VII for foreign-owned corporations and their subsidiaries discussed by Keith Sealing was new to us. See Keith Sealing, Sex, Allies, and BFOQs: The Case for Not Allowing Foreign Corporations to Violate Title VII in the United States, 55 Me. L. Rev. 89 (2003).
in a richer conference and symposium issue than we would have had otherwise.

Labor, which for present purposes is synonymous with "work"—what work is performed, what gets recognized and valued as work, is deeply gendered, as historian Alice Kessler-Harris and others have shown. Images of "workers" for many remain prototypically male (and white); images of "women's work" still resonate with housework and care of young children. Wage disparities and gender segregation remain entrenched. Race, ethnicity, age, and class, are also deeply implicated in the ways that labor is performed, valued, and recognized. Law affects labor and gender, in critically important ways, many of which are discussed in this volume. Law works not just through formal prohibitions, but operates in myriad background ways such as through creating incentives and structuring alternatives. Some scholarship in this volume focuses on formal prohibitions, while other work emphasizes background rules and incentives. Still other work focuses on both aspects, as we see in Maria Ontiveros's multifaceted discussion of law and the lives of female farmworkers and the article by Rebekah Smith, Luisa Deprez, and Sandra Butler on education and welfare reform.

The devaluation of so-called "women's work," whether performed by wives for no pay or by working-class women for little pay, is a longstanding and current subject of feminist concern. Theorists trying to change the valuation of this work have renamed it "care work" and called for various reforms. Several of the articles in this volume look at the debate over care work from new and challenging angles. Another article examines how new technology provides no escape from the devaluation of work done by women. The devaluation of "women's work" is inseparable from gender stereotypes and the devaluation of women. Attention to gender stereotypes and other factors that create barriers to women's advancement is important, as is attention to gender stereotypes that create barriers to the advancement of men who are effeminate, i.e. who are perceived as being like women.

---

11. Katharine Silbaugh defines care work as "meeting the needs of children, the elderly, the sick, or the disabled." Symposium, The Structures of Care Work, 76 Chi.-Kent L. Rev. 1389 (2001).
12. Higgins, supra note 6; McCluskey, supra note 8; Michael Selmi & Naomi Cahn, Caretaking and the Contradictions of Contemporary Policy, 55 Me. L. Rev. 289 (2003).
15. Richard F. Storrow, Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination, 55 Me. L. Rev. 117 (2003). Storrow's article is not solely focused on discrimination against effeminate men but that is part of his concern.
The categories of “law,” “labor,” and “gender” are not monolithic and their content is contested. The rich collection of articles and essays that follows gives us many fruitful ways to approach contemporary issues of law, labor, and gender.

II. THE LAW OF SEX DISCRIMINATION IN EMPLOYMENT

A good place to start in thinking about law, labor, and gender is to consider the current state of sex discrimination law pertaining to employment. Recent Supreme Court decisions challenge well-settled assumptions about Congress’s power to enforce constitutional rights through the Fourteenth Amendment and the Commerce Clause. Calvin Massey reviews the Court’s recent refusals to defer to Congressional findings of fact in the context of what the Court considers to be non-commercial intrastate activities. He concludes that cases such as United States v. Lopez and Morrison v. United States “may not herald much change in congressional ability to prohibit sex discrimination by private or public employers, because such activity is surely a commercial activity, whether or not the activity is intrastate.” In other words, for now, Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, sex, religion, and national origin, is securely constitutional. Yet, despite Title VII’s broad promise of formal sex equality, its reach is limited in important ways, as four other papers in this symposium show.

Massey also discusses a significant pending Supreme Court decision involving the constitutionality of certain provisions of the Family and Medical Leave Act, Hibbs v. Nevada Department of Human Resources. In Hibbs, the Nevada Department of Human Resources is arguing that the Family and Medical Leave Act (FMLA) is unconstitutional as applied to the states because it exceeds the


18. Massey, supra note 7, at 66.


20. However, he interestingly and disturbingly notes that it is possible that the Court could find the Pregnancy Discrimination Act, which forbids employment discrimination on the basis of pregnancy, violative of the Fourteenth Amendment’s enforcement power. Massey, supra note 7, at 85. As he notes, the Supreme Court held in Geduldig v. Aiello, 417 U.S. 484 (1974), that discrimination on the basis of pregnancy is not discrimination against women, and therefore it might be hard to create a convincing legislative record that states have a pattern and history of using pregnancy discrimination to engage in sex discrimination. Id.


22. 273 F.3d 844 (9th Cir. 2001), cert granted sub nom., 122 S.Ct. 2618 (2002).
scope of Congress’s enforcement power under the Fourteenth Amendment. The FMLA, passed in 1993, requires employers to offer up to twelve weeks of unpaid leave for certain family obligations and for an employee’s own health problems. This statute, extremely modest in comparison with leave protections in other industrialized countries, has been repeatedly challenged. The contested status of this modest measure, when contrasted with proposals to restructure workplaces put forth by some care work theorists, presents a discouraging picture.

It is not universally known that the FMLA, while expressed in gender-neutral terms, was aimed to combat sex discrimination in employment. The family leave provision of the FMLA forbids the practice of employers granting family leave to women only. “This discrimination . . . hurts men by not providing them equal opportunity to care for their families and hurts women by effectively forcing them into the caretaking role and thus making them less attractive as employees,” Massey notes. As such, Congress’s main purpose in enacting the Family and Medical Leave Act was to “minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for . . . compelling family reasons, on a gender-neutral basis.” As Massey explains, depending on the specificity of findings that the Supreme Court requires for Congress to exercise its Fourteenth Amendment enforcement power against the states, the decision may make it very difficult for Congress to use its Fourteenth Amendment enforcement power “to create imaginative new remedies to address old and familiar problems” such as those addressed by the FMLA.

Any sustained attention to contemporary issues of labor and gender inevitably requires consideration of “globalization” and international issues. Two of the symposium articles deal with such issues. Keith Sealing’s article deals with exceptions to the nondiscrimination requirements of Title VII that arise from foreign-owned corporations doing business in the United States. Maria Ontiveros’s article, discussed more fully below, examines the situation of women farmworkers in California. Sealing’s contribution highlights a little-known but significant

23. See Massey, supra note 7, at 74, 75. In order for Congress to abrogate the states’ sovereign immunity, it must act under its enforcement powers contained in the Fourteenth Amendment. Id. at 68. Congress cannot waive states’ sovereign immunity by using its powers under the Commerce Clause, Article I, Section 8. See id.


27. Massey, supra note 7, at 73.

28. Michael Selmi and Naomi Cahn’s piece refers to proposals to restructure the workplace by writers such as Joan Williams. Selmi & Cahn, supra note 12, at 297. See generally Symposium, The Structures of Care Work, supra note 11; JOAN WILLIAMS, UNBENDING GENDER, WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT (2001).

29. Massey, supra note 7, at 74.


31. Massey, supra note 7, at 85.

32. Sealing, supra note 4.

33. Ontiveros, supra note 9.
exception to Title VII's prohibitions against sex discrimination. Numerous cases have interpreted a common treaty provision to mean that foreign corporations and their domestic subsidiaries may discriminate against women in the United States. Sealing examines the cases and contrasts them with the treaty provisions and Title VII itself, showing how the decisions are contrary to the language of the treaty provisions and how they have created the worst of all possible worlds for victims of sex discrimination by foreign corporations and their domestic subsidiaries.34 His article, showing that antidiscrimination law even within the United States allows certain forms of cultural discrimination against women in employment, is a useful contribution to the debate over issues of cultural universals and women.35 His solution at this time, not surprisingly, is legislative.36 If Massey is right that employment discrimination laws are constitutionally secure, Congress should be able to amend Title VII to close the loophole created by the decisions.

Richard Storrow's article examines another facet of Title VII; namely its limitations as applied to transgendered workers trying to sue for sex discrimination.37 This piece forms a thought-provoking part of the debates about the nature of gender as it relates to antidiscrimination law.38 Title VII forbids employment discrimination on the basis of "sex" but does not forbid discrimination on the basis of sexual orientation or on the basis of transgendered status. Storrow shows how the model of sex discrimination law as it has developed fails to assist transgendered workers when they are discriminated against for failing to conform to gender expectations.

Storrow examines the "gender stereotyping" theory of Title VII, which originated in the 1989 Supreme Court case of Price Waterhouse v. Hopkins.39 Simply put, the female plaintiff in that case was not made a partner in an accounting firm because, although she was an extremely effective worker, she was not feminine enough. The Supreme Court held that such decisionmaking, based on an employee's failure to conform to gender stereotypes, was illegal sex discrimination under Title VII. This gave rise to the hope that workers who did not conform to gender stereotypes, such as effeminate men, could sue for sex discrimination if they were discriminated against on that basis. As Storrow notes, however, "effeminate men discovered they were foreclosed from invoking the theory [of gender stereotyping as sex discrimination], since courts invariably equated their effeminacy with homosexuality and reiterated that Title VII does not proscribe sexual orientation dis-

34. See generally Sealing, supra note 4.
36. Sealing, supra note 4, at 115.
37. Storrow, supra note 15. Storrow writes:
   "Transgendered" is a term meant to include all "individuals whose gendered self-
   presentation (evidenced through dress, mannerisms, and even physiology) does not
   correspond to the behaviors associated with the members of their biological sex." . . .
   Not all transgendered individuals are transsexual. Transsexuals are individuals who
   wish to conform their bodies to their gender identity and, by way of transition, take
   hormones or submit to surgery to do so. Some transgendered individuals, though,
   live as the opposite gender but do not take hormones or have surgery.

Id. at 135 n.147 (citations omitted).
38. See, e.g., Mary Ann C. Case, Disaggregating Gender From Sex and Sexual Orientation:
He goes on to consider the effect of the Supreme Court’s 1998 case, Oncale v. Sundowner Offshore Services, Inc., which recognizes that same-sex sexual harassment can be recognized as illegal sex discrimination under Title VII on the gender stereotyping theory of sex discrimination. Discrimination against effeminate men because they are perceived as being like women rather than being “manly” seems to be classic sex discrimination tied to the notion that women are inferior to men, yet courts by and large have not seen it that way. Storrow’s descriptions of the impossible double binds created by courts (particularly for transsexuals) are harrowing; his discussion of the promise and shortcomings of the gender stereotyping theory is illuminating.

State antidiscrimination laws have become increasingly important. Even if it ever was wise for advocates of workplace gender fairness to focus solely on federal statutes and federal courts, it certainly is not wise now. Elizabeth Wyman sets forth a comprehensive discussion of state and federal equal pay acts and cases, and provides a useful review of the potential benefits and limitations of these statutes. As Wyman shows, although there are “equal pay for equal work” statutes in most states and at the federal level, almost no cases are brought under these statutes. Yet, women are still paid significantly less than men. There are many reasons for this, of course, but as Wyman suggests, underenforcement of equal pay acts may be an important reason. Part of the problem with using equal pay acts involves the definition of equality, a familiar concern for feminists for decades.

Many of the acts, even if broadly worded, require that jobs be “equal,” which in effect means virtually identical; any difference allows different, less favorable treatment, which is not considered to be discriminatory. Since few jobs are virtually identical, women who bring claims almost always lose. This tendency to conflate equality with sameness, which has bedeviled feminist efforts at reform in various areas, can be partially resolved in this context by interpretations of equality that allow for flexibility in comparison between jobs. This analytical move may be useful for resolving equality dilemmas in other contexts. A flexible interpretation is certainly allowed by many states’ statutes. Regarding the lack of enforcement of the statutes, Wyman suggests that a new administrative mechanism in Maine may be more effective than the current court-based system and may serve as a model for other states.

III. WOMEN, EQUALITY, AND LEADERSHIP

Deborah Rhode’s keynote speech focuses on women and leadership with a particular focus on women in the legal profession. Rhode usefully grounds her

42. See generally Wyman, supra note 7.
43. Also known as “equal pay acts.”
45. Wyman, supra note 7, at 33-34.
46. Id. at 49-54.
47. Rhode, supra note 14. Robert Hirshon, Esq., Immediate Past President of the American Bar Association, gave an outstanding introduction for Professor Rhode (videotape on file with Garbrecht Law Library, University of Maine School of Law).
piece on the extensive body of empirical literature on leadership. This is part of her larger project on women and leadership that will result in a forthcoming collection, The Difference "Difference" Makes.48 Despite formal equality in employment having been the law for almost forty years,49 women are underrepresented in leadership positions in comparison to their numbers. A common explanation for this underrepresentation is that it is a vestigial remnant of past discrimination, soon to fade away into nothingness. Rhode convincingly refutes this explanation. Moreover, she states that "[a]t current rates of change, it would take about three centuries for women to reach parity in Congress or in executive suites."50 In seeking to explain the continued dominance of men in leadership positions, she turns to informal and structural aspects of employment and society. She asserts that "[w]omen's opportunities for leadership are constrained by traditional gender stereotypes, by inadequate access to mentors and informal networks of support, and by inflexible workplace structures."51 Women of color find their "performance is subject to special scrutiny and [their] achievements are often attributed to special treatment."52 Attention to stereotypes, mentoring, and workplace structures is necessary in order to accelerate the pace of change.

Rhode focuses on the content of gender stereotypes as they relate to evaluation of women's performance. As she explains, "the characteristics traditionally associated with women are at odds with the characteristics traditionally associated with leadership, such as strength, assertiveness, authoritativeness, and so on."53 Thus, women, like the plaintiff in Price Waterhouse v. Hopkins mentioned above, still face double binds that can bar their advancement. For example, behavior that may be seen as appropriately assertive in a man is often seen as inappropriately aggressive in a woman. As Rhode in this and other work shows, without conscious changes in institutional networks and structures, the rate of women's advancement will remain painfully slow.54

Rhode's analysis of gender differences in leadership styles and priorities reflects the varied empirical evidence discussed in more detail in her forthcoming collection. Simplistic generalizations about women's and men's leadership styles are not grounded in fact. Yet, women's leadership can make a difference in terms of both style and priorities, and thus, in outcomes.

IV. PROBLEMS OF AGENCY: CONSTRAINTS AND COMPLEXITY

The next four articles deal in various ways with issues of agency. Maria Ontiveros's article, richly grounded in description of the lives of female farmworkers and of agricultural employment practices, focuses on the inadequacy of laws that apply to the situation of women farmworkers in California.55 She also makes

49. Title VII of the Civil Rights Act of 1964 outlawed sex discrimination in employment as well as race, color, and national discrimination in employment.
50. Rhode, supra note 14, at 17.
51. Id.
52. Id. at 18.
54. RHODE, supra note 48.
55. Ontiveros, supra note 9.
broader points about changing ideas of citizenship and about the labor and employment law canon. Based on the concept of "identity-based organizing,"56 she offers some examples of positive change for women farmworkers and provides several ideas for further development. Interestingly, hers is the only article that deals with union issues, despite the importance of unions in labor law both historically and today.57 She explicitly discusses issues of class, which are also raised in the articles by Martha McCluskey and by Michael Selmi with Naomi Cahn, but which are often absent or only given lip service in much recent critical and feminist scholarship.58

Each area of labor and employment law privileges certain workers while excluding and marginalizing others, she shows. The fact that the overtime requirements of the Fair Labor Standards Act do not apply to agricultural workers is one of many examples. Antidiscrimination laws such as Title VII do not reflect the multiple barriers and types of discrimination faced by female farmworkers, which include race, national origin, and immigration status. Ontiveros highlights the fragmented approaches to the myriad workplace issues faced by female farmworkers (health and safety enforcement in one category, wage and hour enforcement in another category, discrimination enforcement in still another category). She describes the transnational lives of female Mexican farmworkers who live in California and also spend time and maintain communities in Mexico. She discusses how traditional concepts of citizenship, defined by naturalization status, do not fit these lives and in fact serve as a basis to deny farmworkers basic human rights. She argues that a new concept of citizenship, defined as including community participation, can help create conditions for agency. She makes a compelling case for a nuanced, integrated, bilingual, and bicultural approach to labor policy in this context, including through the creative use of international law.59

Libby Adler's essay explores ways that law ascribes (and fails to ascribe) agency to youth sex workers, both female and male.60 Transgender kids and gay kids are overrepresented; the majority of youth prostitutes are homeless.61 Adler looks beyond criminal prohibitions to the background rules of contract and family law. For kids, running away is illegal, sleeping outside is illegal, and they cannot get a job to support themselves or sign a binding lease. These rules can create impossible situations, particularly for gay and transgender youth whose parents may be aggressively trying to "change" them. Noting the correlation between homelessness

56. She defines this as ""recognizing the personal as well as class identity of workers, including workers of colour; and recognizing also that these two different types of identity are interrelated, both in defining the oppression faced by workers and in finding solutions to it."" Id. at 159 (quoting MARIA L. ONTIVEROS, A NEW COURSE FOR LABOUR UNIONS: IDENTITY-BASED ORGANIZING AS A RESPONSE TO GLOBALIZATION 417 (Joanne Conaghan et al. eds., 2002)).

57. The conference organizers sent out a mailing to approximately 1600 law professors in October 2001, including all professors in the United States who teach labor law, inviting their participation. No proposals besides that of Professor Ontiveros were submitted that referred to unions.

58. McCluskey, supra note 8; Selmi & Cahn, supra note 12. As Angela Harris notes, we lack a language to talk about issues related to class. Angela P. Harris, Foreward: The Jurisprudence of Reconstruction, 82 CAL. L. R. 741, 777 (1994) (noting the absence of language "to talk about interactions between economic relations and symbolic representations").

59. Ontiveros, supra note 9, at 189.

60. Adler, supra note 8.

61. Id. at 194.
and youth prostitution, she sees much youth prostitution as a "desperate ex-
change."\(^{62}\)

Some youth prostitution, she asserts, may be driven by motivations other than
poverty, and she finds that law does not recognize the potential agency involved.
She uses the example of a house in Revere, Massachusetts, raided by police in the
1970s, where teenaged boys went to get drunk, smoke marijuana, and have sex
with older men for money. No coercion seemed to be involved, and some of the
teens may have gone there because that was where the party was. Simplistic vi-
sions of youth as innocent victims of adults or as total agents held to the same
standards as adults are inadequate to capture the complexity of youth sexual
decisionmaking. While the examples she gives of the potential ambiguities of
sexual agency are of boys, her antinessentialist stance about gender seems to create
the possibility of recognizing potential ambiguities in girls' sexual agency. Her
recognition of the complexities of human agency in many contexts is useful and
insightful, and a reminder of the challenges faced by law and lawmakers.

Rebekah Smith, Luisa Deprez, and Sandra Butler present a comprehensive
and meticulous analysis of welfare policy as it relates to higher education for wel-
fare recipients.\(^{63}\) One of their central conclusions is that higher education for poor
mothers provides the conditions for their agency.\(^{64}\) They focus on the gendered
nature of the 1996 Personal Responsibility and Work Opportunity Reconciliation
Act (PRWORA), commonly known as "welfare reform."\(^{65}\) Taking aim at poor
women, PRWORA asserts that work outside the home is more important than poor
single mothers taking care of their own children at home.\(^{66}\) Although Smith, Deprez,
and Butler reject PRWORA's assertion that poor women's mothering within the
home is unimportant, their focus is in a different direction. Their focus is on ensur-
ing that poor women have access to work outside the home that is valued. Mothers
without higher education who are forced into work by welfare reform remain at
the margins of the labor market in insecure jobs that lack benefits. Smith, Deprez,
and Butler demonstrate through empirical research that the most effective way for
women on welfare to get off welfare permanently and provide a stable income for
their families is for them to obtain a college education. Yet, PRWORA strongly
discouraged states from providing access to higher education for welfare recipi-
ents, resulting in thousands of poor women having to drop out of school and either
take low-paying unstable jobs or enter welfare programs.

Maine made a "visionary" decision in 1996 to reject the antieducation tenets
of PRWORA, and started a state-funded "Parents as Scholars" program to help
indigent parents attend college.\(^{67}\) This program, the subject of a longitudinal study
by social scientists Deprez and Butler, has been an unqualified success, enabling

---

\(^{62}\) Id. (citing Michael Walzer, Spheres of Justice 102 (1983)).

\(^{63}\) See generally Smith et al., supra note 10.

\(^{64}\) They assert that "education provides low-income women with a means to a career, pos-
sible departure from patriarchal structures both within and outside of the home, independence
and economic well-being, and decision-making over their lives." Id. at 222.


\(^{66}\) Smith et al., supra note 10, at 214-15. Welfare reform also had powerful racist aspects.
See, e.g., Tonya L. Brito, From Madonna to Proletariat: Constructing a New Ideology of Moth-

\(^{67}\) Only one other state, Wyoming, created a separate state-funded program for higher edu-
cation at that time but it was never utilized. Smith et al., supra note 10, at 224 n.75.
participants to live lives of economic independence and satisfaction that were unthinkable before. The pending welfare reauthorization bill may improve or worsen the situation nationally, depending on what version passes. 68 Maine’s Senator Olympia Snowe, aware of the Parents as Scholars program, is an important advocate of access to higher education for people on welfare.

One of Smith, Deprez, and Butler’s most provocative points is that higher education can be critically important to promoting gender equity. Demand for women’s productive labor, they and others claim, can diminish gender inequality. 69 Access to higher education for poor women is not enough to eliminate gender-based inequality in “both private and public spheres,” but it should be the priority. Other important factors, in their view, include “assuring pay equity, raising the minimum wage, eliminating job segregation, increasing union affiliation, promoting labor market opportunities, stabilizing benefits, and securing availability of supportive services.” 70 All of these measures relate to valuing women’s work outside the home in the labor market, and create a useful foundation for thinking about the care work articles later in this volume. 71 Smith, Deprez, and Butler’s article powerfully supports the recommendation of focusing on women’s access to education as a priority, made by Michael Selmi and Naomi Cahn in more general terms later in this volume. 72

Tracy Higgins’s thought-provoking essay explores explanations for continuing workplace gender segregation despite formal equality and nondiscrimination principles. 73 She also uses insights from feminist critiques of agency to question both Title VII jurisprudence and feminist arguments for redistributing costs of care work.

Higgins notes that Title VII does not provide a reliable way to attack employment practices that enforce women’s inequality. For example, under Title VII’s disparate impact theory, a plaintiff need not show that an employer intended to discriminate against her, but may win by showing that an unjustified, facially neutral practice operated to her disadvantage. But this theory is narrower than it initially may seem. For example, if a woman claims that an employer’s mandatory overtime policy discriminates against women because of their childcare responsibilities, an employer may successfully defend by saying that the childcare responsibilities are the choice of women. Thus, “[r]elying on the rhetoric of choice, courts regard segregated employment patterns as a product of individual preference rather than illegal discrimination.” 74

Higgins usefully summarizes one of the important theoretical contributions of feminism—its critiques of traditional liberal theory: “Liberal theory assumes that individuals enjoy a relatively robust and undifferentiated capacity for choice. This

68. As of this writing in mid-January 2003, the Senate has not passed a reauthorization bill. Although the 107th Congress was unable to pass a reauthorization bill, the law is continued until March 31, 2003. Three-month extensions are likely to continue while the 108th Congress deliberates. Id. at 237.
69. Smith et al., supra note 10, at 238.
70. Id. at 239–40.
71. Higgins, supra note 6; Selmi & Cahn, supra note 12; McCluskey, supra note 8.
72. Selmi & Cahn, supra note 12.
73. Higgins, supra note 6.
74. Id. at 251.
assumption, in turn, informs economic theory, social policy, and conceptions of justice and fairness.”75 Simply put, if something is seen as a choice, it is seen as fair. Feminist critiques raise foundational issues about this assumption of choice: “If, however, women and men are differently situated with respect to capacity for choice, then facially neutral social policies premised on assumptions of equal agency will in fact perpetuate gender hierarchy.”76 Choice, to Higgins, is “deeply gendered,” which means that theories using choice as a justification for redistribution will not lead to gender equality.77 While feminist critiques of agency have been directed at a range of areas, they have not been directed at Title VII jurisprudence as a whole, according to Higgins. Further analysis of Title VII in light of the feminist critiques of agency, she suggests, should challenge the assumption that fairness and choice are necessarily linked.

Higgins then turns to the debate over policy alternatives for “care work,” which she defines as “the work of caring for the family, especially children, and the burden such work imposes on women’s performance in the paid labor force.”78 She finds that much feminist work in this area does not fully use theories of limited agency but rather relies, implicitly or explicitly, on the liberal model of individual choice. According to her reading of this literature, if women are assumed to have a choice, then no remedy is called for. She uses the example of a recent article by Mary Ann Case, which she says assumes that women have unencumbered choices about having responsibility for children, and therefore argues that it would be unfair to women without children to redistribute the costs of children more broadly.79 And on the other hand, if women’s choices are constrained, according to the literature Higgins examines, then a remedy is called for. She uses examples from the work of Vicki Schultz and Joan Williams to show that their arguments for redistribution of costs depend partly on assumptions that women’s choices are constrained.80 Higgins suggests that empirical questions of how policies affect individual decisions are important but that these empirical questions about choice81 should be distinct from questions of justice and fairness. If feminists thoroughly challenge the assumption that choice and fairness are linked, they may be able to

75. Id. at 252.
76. Id.
77. Id. at 259.
78. Id. at 253.
80. Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749 (1990); Joan Williams, From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition, 76 CHI.-KENT L. REV. 1441, 1471 (2001).
81. She acknowledges the importance of empirical research into how policies might affect women:

Of course, debates over the empirical dimensions of women’s exercise of choice within our culture are necessary and productive to the extent that they yield insight into individuals’ likely responses to policy changes. How will women respond to policies recognizing the market value of housework within marriage? To what extent will enhanced supports for parenting (work that is currently mostly done by women) reinforce traditional patriarchal structures within marriage?

Higgins, supra note 6, at 258.
“articulate alternative accounts of justice and human flourishing that are more likely to lead both to gender integration and gender equality than those prevailing under our current liberal model.”

Higgins’s piece, with its insightful discussion about agency and its explorations of the care work debate, provides a useful segue to the final set of articles.

V. CARE WORK AND THE WORK/FAMILY CONFLICT

The final three papers all are important contributions to the literature about care work and the work/family conflict. Michael Selmi and Naomi Cahn question the wisdom of the recent feminist focus on valuing care work, articulating the concern that “emphasizing care work will ultimately lead to policies designed to facilitate women’s work in the home without substantially changing the gender dynamics of the home or the workplace.” They draw parallels between the political right’s emphasis on promoting marriage as the route out of poverty for women, and the political left’s emphasis on proposals to accommodate or facilitate care work outside of the labor market, arguing that “each set of proposals can be seen as reinforcing, and in some ways reifying, women’s role within the home.”

They question the empirical assumptions, implicit in much of the care work literature, that most women can not balance the demands of work and family, and that women in large numbers are dropping out of the workforce because of this inability. They further note that much of the care work literature focuses primarily on the situation of female professionals, and that it is therefore classist in nature. They note that the care work literature denies resting on a normative preference for care work over paid work, or on a notion that care work is “women’s work.” Nonetheless, they find such a normative preference for care work in the proposals put forward by care work literature, “all of which are designed to facilitate, or accommodate, care work outside of the labor market rather than to lighten the burden of care work so as to enable women to devote more time to paid wage work.” Rather than focusing on revaluing care work, the strategic emphasis should be on increasing women’s access to education, changing the structure of the school day and the school year, and combating sex discrimination at work, they assert. This article is a challenging addition to the care work debate.

Martha McCluskey’s essay takes the care work discussion in a new, creative direction. She looks at family caretaking for workers rather than dependents in order to examine the conflict between market work and family care. Paying rigorous attention to issues of class, race, and sexuality, as well as gender, she high-

82. Id. at 259.
83. Katharine Silbaugh, who edited the recent Chicago-Kent Symposium on the structures of care work, also attended the conference and gave a fascinating presentation that focused on the extraordinarily large value, worldwide, of care work performed by women. See, e.g., Symposium, The Structures of Care Work, supra note 11. (Videotape on file with Garbrecht Law Library, University of Maine School of Law).
84. Selmi & Cahn, supra note 12, at 299.
85. Id. at 291.
86. Id. at 301.
87. Id.
88. Id. at 306.
89. Id. at 306-12.
90. McCluskey, supra note 8.
lights the background rules of tax and social security and how they treat various
types of wage earners and family arrangements. These background rules create
what she calls a “system of public support for workers’ care.”
High-end wage
earners with non-wage earning spouses are treated most favorably by tax and so-
cial security, resulting in a major public benefit to these wage earners. This benefit
is masked by a powerful ideology that holds that while families with a mother on
welfare are “dependent,” families with a high-end wage earner and non-wage earn-
ing spouse are “self-sufficient.” She urges the recognition that household labor is
not synonymous with childcare. Further, she highlights the fact that non-wage
earning spouses of high-end wage earners often provide many services that are not
recognized by the market. McCluskey advocates revising the system “so that pub-
lic support is redirected to the basic care needs of low- and moderate-income workers
and to paid care work—as well as to unpaid care work performed by workers for
themselves or by relatively equal-earning spouses.” By focusing on worker care
rather than childcare, McCluskey reframes the debate over care work in a way that
might bridge existing divides concerning work/family issues and recommended
policy priorities.

Michelle A. Travis focuses on telecommuting as it relates to work/family con-
flicts, and also sheds light on the relationship between technology and society.
Far from being the idyllic, gender-equalizing technology that some predicted,
telecommuting has worked to the disadvantage of women, further marginalizing
their place in the workforce and not raising their status at home. Telecommuting
could play an important role in restructuring workplaces in the way that many
feminists advocate, but it is a technology that is a part of society and as such oper-
ates according to societal constraints. As she shows, there are two worlds of
telecommuting; one for a privileged category, consisting mostly of men, which
involves increased convenience and no loss of benefits or status. By contrast,
most women’s telecommuting experience has been linked to increased casualization
of jobs, and loss of benefits, status, and opportunities for advancement.

Travis warns that “there is a very real risk that telecommuting will become a
modern-day version of the historic, exploitative forms of industrial homework that
were prevalent in the United States in the early and mid-twentieth century.” She
draws on the history of legislation regulating industrial homework, which like other
special legislation, effectively “reinforced the preexisting gender segregation and

91. Id. at 327.
92. Id. McCluskey favors “revising family tax and social security support to tie benefits to
individual low and modest earnings rather than to high earnings, marital status, and to unequal
marital earnings.” Id. She plans to expand on the possibilities for reform in a future article.
93. Travis, supra note 13.
94. Travis’s presentation was accompanied by various advertisements with photographs show-
ing women and men telecommuters. These materials reflected the empirical data that Travis
discussed, that when men telecommuted they tended to have a separate space in their home and
did not take on additional child care responsibilities, while when women telecommuted they
tended to work in a central location and increase their childcare responsibilities. The images
included a man talking on the phone in a study looking out at a child riding a bicycle and waving
at the child, and a woman talking on the phone in a kitchen with a sleeping baby by her side. In
another image, a woman worked in a central area while her daughter sat nearby apparently
happily doing schoolwork. (Videotape on file with Garbrecht Law Library, University of Maine
School of Law).
95. Travis, supra note 13, at 277.
96. Id. at 283.
inequality in both paid and unpaid work." Instead of special legislation aimed at the evils of telecommuting, she recommends framing the issue as an "equal opportunity" issue, advocates conceptualizing telecommuting arrangements that work to the disadvantage of women as sex discrimination, and suggests expanding antidiscrimination law to cover caregivers and imposing an accommodation duty on employers as disability discrimination law does.

V. CONCLUSION

Several salient points emerge from considering each of these articles and essays as part of a larger whole. First, an impressively broad range of concerns are implicated by the theme of Law, Labor, and Gender, ranging from welfare reform and education, to women and leadership, to conditions of work for farmworker women, to transgender issues in the workplace. Second, the promise of formal equality and freedom from employment discrimination on the basis of sex made by Title VII has not been fulfilled by courts in several contexts. Third, close attention must be paid to the specifics of different employment situations in order to begin to grasp their complexities for the people involved. Fourth, in order to formulate laws and policy proposals, we must confront the tensions that inhere in our understanding of agency. Fifth, analysis of contexts and assumptions, together with a broader focus on empirical evidence, can lead us to useful generalizations and productive debate about policy recommendations. The authors show us that while specific legal reforms are urgent in some areas, law reform is not a comprehensive solution. In some areas, efforts to change informal structures are essential. In other areas, more analysis and debate are necessary. I want to thank the authors for their contributions and cooperation in the development of this symposium issue. My hope is that this Symposium will foster discussion, and where appropriate, action, and will contribute to the ongoing debates on the important issues examined here.

97. Id. at 285-86.